

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

JUSTIN LOPER,

Petitioner,

vs.

BRIAN WILLIAMS, et al.

Respondents.

Case No. 2:10-CV-01011-RLH-(PAL)

ORDER

Petitioner has submitted an application to proceed in forma pauperis (#5). The court finds that petitioner is unable to pay the filing fee. The court has reviewed the petition pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts. Petitioner will need to file an amended petition.

In the Eighth Judicial District Court, petitioner pleaded guilty to crimes, but he does not allege what those crimes were, nor does he allege what his sentences were.¹ Petitioner will need to complete all of the applicable sections in his amended petition.

In ground 1, petitioner alleges that counsel provided ineffective assistance in several instances. “[T]he right to counsel is the right to the effective assistance of counsel.” McMann v. Richardson, 397 U.S. 759, 771 & n.14 (1970). A petitioner claiming ineffective assistance of counsel must demonstrate (1) that the defense attorney’s representation “fell below an objective

¹A fragment of court minutes attached to the petition shows some of petitioner’s sentences, but that fragment is cut off and does not state what the crimes were.

1 standard of reasonableness,” Strickland v. Washington, 466 U.S. 668, 688 (1984), and (2) that the
2 attorney’s deficient performance prejudiced the defendant such that “there is a reasonable
3 probability that, but for counsel’s unprofessional errors, the result of the proceeding would have
4 been different,” id. at 694. “[T]here is no reason for a court deciding an ineffective assistance claim
5 to approach the inquiry in the same order or even to address both components of the inquiry if the
6 defendant makes an insufficient showing on one.” Id. at 697. In all of the instances that petitioner
7 presents, his allegations are too vague and conclusory to warrant habeas corpus relief. See James v.
8 Borg, 24 F.3d 20, 26 (9th Cir. 1994).

9 First, petitioner argues that counsel promised him that he would receive no more than
10 three to eight years in prison. Because petitioner has not completed the petition form, the court has
11 no way to compare this claim to the sentence that petitioner actually received.

12 Second, petitioner argues that counsel did not investigate the case and did not speak
13 with witnesses who could have provided information that would have lessened the degree of guilt of
14 petitioner. Petitioner does not allege who these witnesses are or what they could have told counsel.

15 Third, petitioner argues that counsel did not file a pre-trial writ of habeas corpus that
16 challenged the sufficiency of the evidence. A defendant may file a pre-trial petition based upon a
17 lack of probable cause to bind him over to trial. See Nev. Rev. Stat. § 34.700. However, petitioner
18 has not alleged what evidence was presented to the grand jury or at the preliminary hearing, let
19 alone how it was insufficient for him to be tried.

20 Fourth, petitioner argues that counsel failed to file a motion to withdraw a plea
21 agreement. A plea agreement must be entered knowingly and voluntarily. Brady v. United States,
22 397 U.S. 742, 748 (1970). Petitioner does not allege how his plea was either unknowing or
23 involuntary.

24 Ground 2 provides some hint as to why petitioner wanted to withdraw his guilty plea,
25 but it is still too vague. See James, 24 F.3d at 26. Petitioner alleges again that counsel failed to file
26 a motion to withdraw his plea. Petitioner also alleges that counsel did not argue at sentencing that
27 the co-defendants were receiving lighter sentences than what petitioner received. Apart from not
28 alleging what his sentence is, petitioner also has not alleged what sentences his co-defendants

1 received, and he also has not alleged whether his co-defendants were charged with the same crimes.
2 In other words, petitioner has not alleged facts that could indicate that his plea was not knowing or
3 voluntary. Petitioner also appears to believe that the Federal Rules of Criminal Procedure apply to
4 criminal proceedings in state-court. They do not, and he should not refer to the rules in his amended
5 petition.

6 In ground 3, petitioner presents four claims that the Eighth Amendment's ban on
7 cruel and unusual punishment was violated. All of them are too vague and conclusory to warrant
8 habeas corpus relief. See James, 24 F.3d at 26.

9 First, petitioner claims that the state district court imposed a much harsher sentence
10 based upon dismissed charges in petitioner's past. This court has no means of determining whether
11 the sentence was excessive, because petitioner has not alleged what his sentence was.

12 Second, petitioner claims that the state district court did not replace counsel when it
13 was clear that counsel was conflicted. This is more of a claim of ineffective assistance of counsel
14 pursuant to the Sixth Amendment than it is a claim that his sentence is cruel and unusual pursuant to
15 the Eighth Amendment. Nonetheless, petitioner does not allege what that conflict was.

16 Third, petitioner claims that the state district court failed to preserve the record and to
17 hold an evidentiary hearing to secure testimonies and evidence that might have been destroyed.
18 Petitioner does not allege what that evidence was, and how it might have affected his sentence.

19 Fourth, petitioner claims that the state district court should have let petitioner
20 withdraw his guilty plea or withdraw for specific performance of the plea agreement. Petitioner
21 does not allege how the plea agreement was breached.

22 IT IS THEREFORE ORDERED that the application to proceed in forma pauperis
23 (#5) is **GRANTED**. Petitioner need not pay the filing fee of five dollars (\$5.00).

24 IT IS FURTHER ORDERED that the clerk of the court shall file the petition for a
25 writ of habeas corpus pursuant to 28 U.S.C. § 2254.

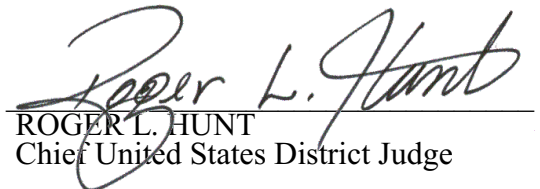
26 IT IS FURTHER ORDERED that the clerk of the court shall send petitioner a
27 petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 form with instructions. Petitioner
28 shall have thirty (30) days from the date that this order is entered in which to file an amended

1 petition to correct the noted deficiencies. Failure to comply with this order will result in the
2 dismissal of this action.

3 IT IS FURTHER ORDERED that petitioner shall clearly title the amended petition
4 as such by placing the word "AMENDED" immediately above "Petition for a Writ of Habeas
5 Corpus Pursuant to 28 U.S.C. § 2254" on page 1 in the caption, and petitioner shall place the docket
6 number, 2:10-CV-01011-RLH-(PAL), above the word "AMENDED."

7 IT IS FURTHER ORDERED, as per prior agreement, that the clerk of court shall add
8 Attorney General Catherine Cortez Masto (listed under Cortez) as counsel for respondents and shall
9 make informal electronic service of this order upon respondents by directing a notice of electronic
10 filing to her office. Respondents' counsel shall enter a notice of appearance herein within twenty
11 (20) days of entry of this order, but no further response shall be required from respondents until
12 further order of the court.

13 DATED: August 19, 2010.

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16 ROGER L. HUNT
17 Chief United States District Judge
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